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KNOBBE MARTENS OLSON & BEAR LLP 2040 MAIN STREET FOURTEENTH FLOOR IRVINE, CA 92614				SHAH, AMEE A
ART UNIT		PAPER NUMBER		
3625				
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			10/16/2009	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/750,163	HARDING ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	AMEE A. SHAH	3625	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 25 June 2009.
- 2a) This action is **FINAL**.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 3-11 and 33-72 is/are pending in the application.
- 4a) Of the above claim(s) 71 and 72 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 3-11 and 33-70 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ .                                    |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ .  | 6) <input type="checkbox"/> Other: _____ .                        |

## **DETAILED ACTION**

Claims 3-11 and 33-72 are pending in this action.

### ***Election/Restrictions***

Newly submitted claims 71 and 72 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: claim 3 and related inventions and claims 71 and 72 are related as subcombinations disclosed as usable together in a single combination. The subcombinations are distinct if they do not overlap in scope and are not obvious variants, and if it is shown that at least one subcombination is separately usable. In the instant case, the subcombination comprising claims 71 and 72 has separate utility such as suspending sellers with a low score, not required by the inventions of claims 3, 7, 8, 58 and their dependents. See MPEP § 806.05(d).

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 71 and 72 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 4 and 5 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Regarding claim 4, the specification does not provide adequate support for the limitation “the identifying those (1) that are offering the item for sale, (2) whose availability level for the item exceeds a predetermined availability threshold, and (3) having a seller score relating to a plurality of different items offered for sale by the seller that exceeds a predetermined score threshold, and the selecting as the featured seller of the item, from the sellers identified among the plurality of sellers, the identified seller that is offering the item at the lowest price are performed before the receiving the request for information about the item from the user.” The specification provides at ¶0032 for storing ratings of sellers and recommendations based those rating, but does provide support for having the featured seller based on offering an item for sale, having availability of the item, and a seller score exceeding a level *before* receiving a user request for an item. Furthermore, Figure 8 shows that the steps of identifying based on offering, availability and score and selecting from the identified sellers are performed after receiving a user request.

Regarding claim 5, the specification does not provide adequate support for the limitation “determining a most recently selected featured seller, where the most recently selected featured seller was selected using the acts of identifying those (1) that are offering the item for sale, (2) whose availability level for the item exceeds a predetermined availability threshold, and (3)

having a seller score relating to a plurality of different items offered for sale by the seller that exceeds a predetermined score threshold...” The specification provides at ¶0031 for having a seller as the presently designated recommended seller, i.e. most recently featured seller, based on seller score but does not provide support for selecting that seller based on offering the item for sale.

***Claim Rejections - 35 U.S.C. § 103***

The following is a quotation of 35 U.S.C. §103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

**Claims 3, 5-11, 33, 40-42, 45, 52-54, 58, 59, and 66-68 are rejected under 35 U.S.C. 103(a) as being unpatentable over Miller et al., US 2001/0054008 A1, previously cited**

**(hereafter referred to as “Miller” in view of English, US 2003/0055723 A1, previously cited (hereafter referred to as “English”) further in view of Chopra, US 2002/0128920 A1, previously cited (hereafter referred to as “Chopra”) and further in view of Hartman et al., US 5,960,411, previously cited (hereafter referred to as “Hartman”).**

Referring to claims 3, 6, 7, 9, 42, 54, 58 and 68. Miller teaches a method in a computing system for responding to a request for information about an item (see, e.g., Abstract), comprising:

- receiving at the computer system a request for information about the item (Figs. 10 and 11 and ¶¶0171 and 0176);
  - among a plurality of sellers, identifying via a computer system those that are offering the item for sale and whose availability level for the selected item exceeds a predetermined availability threshold (¶¶0171, 0172, 0174, 0176 and 0178 – note the predetermined availability threshold is one, i.e. the item being in stock);
    - selecting via the computer system as the featured seller of the item, from the sellers identified among the plurality of sellers, the identified seller that is offering the selected item at the lowest price (Fig. 11 and ¶0176-0179 – note the selection of the vendor can be based on price, which can be the lowest price, and that the features seller is chosen from those sellers that are offering the item for sale and also from those that may have the item in stock); and
      - replying via the computer system to the request for information with a web page associated with a web page containing a perceptible distinction with respect to a featured/distinguished seller and both (1) information describing the item including the price at which the featured/distinguished seller is offering the item, and (2) a control that, when

activated, adds the item to a shopping cart associated with the user so that the order will be placed from the seller when check out is performed the item from the featured seller or another seller (Fig. 5A, which shows a hyperlink to "Add this to my BuyList," and a perceptible distinction with respect to a distinguished seller, OfficeMax who is in another, separate box, and ¶¶0151, 0171, 0173, 0176, 0179, 0193 – note that the adding to the BuyList, i.e. shopping cart, next to each seller, including the featured seller and non-featured sellers, is for the intended use of placing the order from the seller when check out is performed and that there is a universal shopping cart associated with each buyer).

While Miller teaches identifying sellers based on various criteria including identifying a distinguished seller, it does not explicitly teach identifying sellers that have a seller score relating to a plurality of different items offered for sale by the seller that exceeds a predetermined score threshold. English teaches a method of comparing, advertising and switching vendors including the known technique of selecting the vendors having the item for sale based on a score relating to a plurality of different items offered for sale by the seller that exceeds a predetermined score threshold (¶0062 – note the score is the aggregate rating and the predetermined threshold is the current vendor aggregate rating). This known technique is applicable to the method of Miller as they both share characteristics and capabilities, namely they are directed to providing buyers with information.

One of ordinary skill in the art would have recognized that applying the known technique of English would have yielded predictable results and resulted in an improved method. It would have been recognized that applying the known technique of English to the teachings of Miller would have yielded predictable results because the level of ordinary skill in the art demonstrated

by the references applies shows the ability to incorporate such references into similar methods. Further, selecting a seller based on meeting a predetermined score threshold, as taught by English, would have been recognized by those of ordinary skill in the art as resulting in an improved method that would allow for customers to have more and better access to information relating to an item in order for the customer to make better purchasing decisions, as suggested by Miller (¶0007).

While Miller/English teaches identifying sellers based on various criteria including identifying a distinguished seller based on price, which can be the lowest price, and allowing users to purchase items, it does not explicitly teach identifying a seller based on the lowest price. Chopra teaches a method for providing lowest cost purchasing including identifying a seller based on the lowest price (¶¶0023-0026) and wherein the user does not navigate to the featured seller Web site to complete the purchase from the featured seller but orders it directly from the website (¶0029). This known techniques is applicable to the method of Miller/English as they all share characteristics and capabilities, namely they are directed to providing buyers with information.

One of ordinary skill in the art would have recognized that applying the known techniques of Chopra would have yielded predictable results and resulted in an improved method. It would have been recognized that applying the known techniques of Chopra to the teachings of Miller/English would have yielded predictable results because the level of ordinary skill in the art demonstrated by the references applies shows the ability to incorporate such references into similar methods. Further, having the identified seller of Miller be based on lowest price, as taught by Chopra, would have been recognized by those of ordinary skill in the

art as resulting in an improved method that would allow for customers to get the information they desire regarding price.

While Miller/English/Chopra teaches providing a control to a user who submitted the request which when activated orders the item from the seller via the website (Miller, Fig. 5A, "BuyItNow" which when activated, orders the item from the seller), it does not specifically teach that the ordering is performed via the website without the user performing any subsequent interactions. Hartman teaches a method, system and program for ordering through "one-click" wherein items can be ordered by activating one control without the user performing any subsequent interactions (see, e.g., Abstract and col. 3, lines 31-66).

It would have been obvious to one of ordinary skill in the art of business methods at the time of the invention to include in the commerce method and apparatus of Miller/English/Chopra the ability to order an item through activating a control without the user performing any subsequent interactions, as taught by Hartman, since the claimed invention is merely a combination of old elements, and in the combination each element would have performed the same function as it did separately, and one ordinary skill in the art would have recognized that results of the combination were predictable.

Referring to claim 5. Miller/English/Chopra/Hartman teaches the method of claim 3 wherein the identifying and selecting is performed at a uniform time interval (Miller, ¶0179 – note the uniform interval is each time a request is received which is uniform in that it is evenly applied), and determining a most recently selected featured seller by using the acts of identifying those offering the item for sale, having availability above a threshold, and having a rating above

a threshold, wherein the most recently selected featured seller is used in replying to each of a plurality of received requests (Miller, ¶¶0175 and 0188 and English, ¶0062 –note that the featured seller is selected from criteria including offering the item for sale, availability and score and that from these, the most recently selected featured seller is determined by the further criteria of paying seller and the most hits).

Referring to claims 8 and 11. All of the functional limitations in apparatus claims 8 and 11 are closely parallel to the limitations of method claims 3 and 6, analyzed above and are rejected on the same bases (see also Miller, Figs. 2, 6 and 7 and ¶¶009 and 0148-0159 discussing a program to create a web page for the functions enumerated).

Referring to claim 10. Miller/English/Chopra/Hartman teaches the apparatus of claim 8 wherein the data structure further contain content specifying the display of one or more secondary controls that may be activated to order the selected item from a different one of the plurality of sellers other than the distinguished seller (Miller, Fig. 5A - note the "BuyItNow" or "Add to BuyList" controls are by each seller), but do not specifically teach that the control for the distinguished seller is displayed more prominently than the secondary controls. However, this difference is only found in the nonfunctional descriptive material and is not functionally involved in the functions of specifying the display of secondary controls recited. The specifying of the display of secondary controls would be performed in the same manner regardless of whether the controls were smaller or larger than others, particularly because it is simply a display. Thus, the non-functional descriptive material will not distinguish the claimed invention

from the prior art in terms of patentability. *See In re Gulack*, 703 F.2d 1381, 1385, 217 USPQ 401, 404 (Fed. Cir. 1983); *In re Lowrey*, 32 F.3d 1579, 32 USPQ2d 1031 (Fed. Cir. 1994).

Therefore, it would have been obvious to a person of ordinary skill in the art at the time of the invention to specify the display of secondary controls regardless of the specific size of the control, because such information does not functionally relate to the displaying of controls function and also because the subjective interpretation of the displaying does not patentably distinguish the claimed invention. Furthermore, claims directed to an apparatus must be distinguished from the prior art in terms of structure rather than function, *see In re Danly* 263 F.2d 844, 847, 120 USPQ 582, 531 (CCPA 1959). A claim containing a “recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus” if the prior art apparatus teaches all the structural limitations of the claim. *Ex parte Masham*, 2 USPQ2d 1657 (Bd. Pat. App. & Inter. 1987). Thus the structural limitations of claim 10, including a data structure specifying the display of secondary controls are taught by Miller.

Referring to claims 33, 45 and 59. Miller/English/Chopra/Hartman further teaches wherein the featured seller is visually emphasized on a web page with respect to other sellers identified on the web page (Miller, Fig. 5A – note that "OfficeMax" as a local seller is visually identified in a separate box that emphasizes OfficeMax, and English, ¶0074 – note that by placing the featured vendor first, the featured seller is visually emphasized with respect to other sellers).

Referring to claims 40, 41, 52, 53, 66, and 67. Miller/English/Chopra/Hartman teaches the method and apparatus of claims 3, 7 and 58 further comprising providing a plurality of controls corresponding to at least a portion of the sellers, including those other than the featured seller, wherein activation of any of the plurality of controls will cause the item to be added to the user's shopping cart (Miller, Fig. 5A, which shows a hyperlink by at least a portion of the sellers to "Add this to my BuyList," i.e. a shopping cart, wherein clicking on the hyperlink will cause the item to be added to the user's shopping cart and ¶¶0151, 0171, 0173, 0176 and 0179).

**Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Miller/English/Chopra/Hartman as applied to claim 3 above, and further in view of Das et al., US 2003/0023499 A1, previously cited (hereafter referred to as "Das").**

Referring to claim 4. Miller/English/Chopra/Hartman teaches the method of claim 3 wherein before the receiving the request for information from a user, the identifying those that are offering an item for sale, whose availability levels exceed a predetermined availability threshold, and having a seller score exceeding a predetermined score threshold (Miller, ¶0175 and English, ¶¶0064-0074— note that by having featured vendors being selected from those that have paid a fee for a particular item the seller sells and has, and having a database with seller ratings and pre-selected recommended sellers, the identifying occurs before a request is received). Miller/English/Chopra/Hartman further teaches selecting a featured seller from identified sellers, the identified seller offering the item at the lowest price (Chopra, ¶¶0023-0026). However, Miller/English/Chopra/Hartman does not teach, however, the selecting of the featured seller before receiving the request for information from the user.

Das teaches a method and system for automatically making operations decisions including the known technique of selecting as a featured seller from identified sellers the seller offering the item at the lowest price before receiving a request for information from a user (¶¶0079 and 0104 - note that the sellers' prices and selection of sellers based on rules are performed before any request and stored in the databases). This known techniques is applicable to the method of Miller/English/Chopra/Hartman as they all share characteristics and capabilities, namely they are directed to providing information and facilitating purchases.

One of ordinary skill in the art would have recognized that applying the known techniques of Das would have yielded predictable results and resulted in an improved method. It would have been recognized that applying the known techniques of Das to the teachings of Miller/English/Chopra/Hartman would have yielded predictable results because the level of ordinary skill in the art demonstrated by the references applies shows the ability to incorporate such references into similar methods. Further, having the selection of a features seller Miller/English/Chopra/Hartman be performed prior to the request for information, as taught by Das, would have been recognized by those of ordinary skill in the art as resulting in an improved method that would allow for a faster system by referring to a pre-selected database.

**Claims 34-39, 46-51 and 61-65 are rejected under 35 U.S.C. 103(a) as being unpatentable over Miller/English/Chopra/Hartman as applied to claims 3, 7 and 58 above, and further in view of Callender et al., US 2002/0147657 A1, previously cited (hereafter referred to as “Callender”).**

Referring to claims 34, 35, 46, 47 and 61. Miller/English/Chopra/Hartman teach the methods and apparatus of claims 3, 7 and 58 wherein the threshold is settable to different values (English, ¶0062), but do not teach the availability threshold being settable to different values and settable to a time period corresponding to a plurality of days. Callender teaches a method, system and program for determining item availability including the known technique of setting an availability threshold to a time period corresponding to a number of days (Fig. 7 and ¶¶0006, 0007, 0026 and 0027 – note that the time period is today, tomorrow, etc., i.e. the number of days can be one (today), two (tomorrow) etc., for determining availability). This known technique is applicable to the method of Miller/English/Chopra/Hartman as they all share characteristics and capabilities, namely they are all directed to providing information to buyers and purchasing products.

One of ordinary skill in the art would have recognized that applying the known technique of Callender would have yielded predictable results and resulted in an improved method. It would have been recognized that applying the known technique of Callender to the teachings of Miller/English/Chopra/Hartman would have yielded predictable results because the level of ordinary skill in the art demonstrated by the references applies shows the ability to incorporate such references into similar methods. Further, setting the availability threshold to different values and corresponding to a time period corresponding to a plurality of days, as taught of Callender would have been recognized by those of ordinary skill in the art as resulting in an improved method that would allow buyers to have a better idea whether the item is still likely to be in stock when they order it, as suggested by Callender (¶0004).

Referring to claims 36, 37, 48, 49, 62 and 63. Miller/English/Chopra/Hartman teach the methods and apparatus of claims 3, 7 and 58 providing for a display to a user who submitted the request an availability level of the featured seller and other sellers, but do no specifically teach displaying a numerical value corresponding to the availability level of the sellers. Callender teaches a method, system and program for determining item availability including the known technique of displaying the number of units available at each retailer, i.e. a numerical value corresponding to the availability level of the featured seller and other sellers (¶0026). This known technique is applicable to the method of Miller/English as they all share characteristics and capabilities, namely they are all directed to providing information to buyers and purchasing products.

One of ordinary skill in the art would have recognized that applying the known technique of Callender would have yielded predictable results and resulted in an improved method. It would have been recognized that applying the known technique of Callender to the teachings of Miller/English/Chopra/Hartman would have yielded predictable results because the level of ordinary skill in the art demonstrated by the references applies shows the ability to incorporate such references into similar methods. Further, displaying a numerical value corresponding to the availability level of the featured seller and other sellers, as taught of Callender would have been recognized by those of ordinary skill in the art as resulting in an improved method that would allow buyers to have a better idea whether the item is still likely to be in stock when they order it, as suggested by Callender (¶0004).

Referring to claims 38, 50 and 64. Miller/English/Chopra/Hartman teach the methods and apparatus of claims 3, 7 and 58 providing for a display to a user who submitted the request an availability level of the featured seller and other sellers, but do no specifically teach displaying a numerical value corresponding to the availability level of the sellers, wherein the numerical value is settable to a value greater than one. Callender teaches a method, system and program for determining item availability including the known technique of displaying the number of units available at each retailer, i.e. a numerical value corresponding to the availability level of the featured seller and other sellers, wherein the numerical value is settable to a value greater than one by the retailer (¶0026). This known technique is applicable to the method of Miller/English/Chopra as they all share characteristics and capabilities, namely they are all directed to providing information to buyers and purchasing products.

One of ordinary skill in the art would have recognized that applying the known technique of Callender would have yielded predictable results and resulted in an improved method. It would have been recognized that applying the known technique of Callender to the teachings of Miller/English/Chopra/Hartman would have yielded predictable results because the level of ordinary skill in the art demonstrated by the references applies shows the ability to incorporate such references into similar methods. Further, displaying a numerical value corresponding to the availability level of the featured seller and other sellers and settable to a value greater than one, as taught of Callender would have been recognized by those of ordinary skill in the art as resulting in an improved method that would allow buyers to have a better idea whether the item is still likely to be in stock when they order it, as suggested by Callender (¶0004).

Referring to claims 39, 51 and 65. Miller/English/Chopra/Hartman teach the methods and apparatus of claims 3, 7 and 58 providing for a display to a user who submitted the request an availability level of the featured seller and other sellers, but do no specifically teach displaying a range corresponding to an availability level of at least one of the plurality of sellers, the range including an lower bound and an upper bound wherein the upper bound is different than the lower bound. Callender teaches a method, system and program for determining item availability including the known technique of displaying the number of units available at each retailer with a range of how many units would be available at what time, i.e. a range corresponding to an availability level within upper and lower bounds (¶¶0026-0027 – note that the range is that 2 units are available tomorrow, but x units are available today, the bounds which may be different). This known technique is applicable to the method of Miller/English/Chopra/Hartman as they all share characteristics and capabilities, namely they are all directed to providing information to buyers and purchasing products.

One of ordinary skill in the art would have recognized that applying the known technique of Callender would have yielded predictable results and resulted in an improved method. It would have been recognized that applying the known technique of Callender to the teachings of Miller/English/Chopra/Hartman would have yielded predictable results because the level of ordinary skill in the art demonstrated by the references applies shows the ability to incorporate such references into similar methods. Further, displaying a range of availability levels within lower and upper bounds, as taught of Callender would have been recognized by those of ordinary skill in the art as resulting in an improved method that would allow buyers to have a better idea

whether the item is still likely to be in stock when they order it, as suggested by Callender (¶0004).

**Claims 43, 44, 55-57, 69 and 70 are rejected under 35 U.S.C. 103(a) as being unpatentable over Miller/English/Chopra/Hartman, as applied to claims 3, 7 and 58 above, and further in view of Abdulhayoglu, US 7,296,053 B1, previously cited (hereafter referred to as “Abdulhayoglu”).**

Referring to claims 43, 44, 55-57, 69 and 70. Miller/English/Chopra/Hartman teaches providing the user with information regarding the sellers which can be sorted by price, as discussed above, and where a highlighted seller can be selected based on various criteria such as shipping availability (Miller, ¶0178), but does not specifically teach displaying to the user shipping timing information for the item for the featured seller and at least one other seller based on a determination as to which of the plurality of sellers has the fastest shipping time, wherein the determination is made using shipping time information corresponding to the plurality of sellers. Abdulhayoglu teaches a method and apparatus for providing user information regarding products available through various merchants including the known technique of displaying shipping time information for each seller based on a determination as to which of the plurality of sellers has the fastest shipping time, wherein the determination is made using shipping time information corresponding to the plurality of sellers (col. 5, line 46 through col. 6, line 37 - note that shipping times are received from the merchants and displayed to the user in a desired format), and once the shipping times are retrieved, the sellers with the fastest shipping time can

be selected and indicated as such, as taught by Miller (¶0178). This known technique is applicable to the method of Miller/English/Chopra/Hartman as they all share characteristics and capabilities, namely they are all directed to providing information to buyers and purchasing products.

One of ordinary skill in the art would have recognized that applying the known technique of Callender would have yielded predictable results and resulted in an improved method. It would have been recognized that applying the known technique of Abdulhayoglu to the teachings of Miller/English/Chopra/Hartman would have yielded predictable results because the level of ordinary skill in the art demonstrated by the references applies shows the ability to incorporate such references into similar methods. Further, obtaining and displaying shipping times, as taught of Abdulhayoglu would have been recognized by those of ordinary skill in the art as resulting in an improved method that would allow buyers to make a better comparison between vendors based on desirable criteria, as suggested by Abdulhayoglu (col. 6, lines 19-23).

***Response to Amendment***

Applicant's amendment, filed June 25, 2009, has been entered. Claims 3-5, 7 and 58 have been amended. In view of the amendments to the claims, the previous 35 USC §112 rejections for claims 3-7 and 33-57 and the 35 USC §101 rejections for claims 58-70 are withdrawn.

***Response to Arguments***

Applicant's arguments with respect to the claims have been considered but are moot in view of the new ground(s) of rejection. However, to the extent some of the arguments are still applicable, the examiner addresses them as follows.

Applicant's arguments filed June 25, 2009, have been fully considered but they are not persuasive. In response to applicant's argument that neither Miller nor English disclose "first identifying sellers based on a first set of criteria, and then further performing a selection of the identified sellers by selecting as a featured seller, from the sellers identified among the plurality of sellers, an identified seller offering the item at the lowest price," (Remarks, pages 13-15), the examiner disagrees. The examiner notes that applicant's arguments are effectively against the references individually, and one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). As discussed above, Miller teaches among a plurality of sellers, identifying sellers based on a first set of criteria, i.e. those that are offering the item for sale and whose availability level for the selected item exceeds a predetermined availability threshold and selecting as the featured seller of the item from the identified sellers based on price (which could be the lowest price) (see Fig. 11). Miller also teaches then further performing a selection from those identified sellers a featured seller based on other criteria, one of which can be, while not explicitly stated, lowest price (Fig. 11 and ¶¶0176-0179). Examiner agrees that Miller does not teach identifying sellers based on the criteria comprising scores. However, as also discussed above, English teaches the known technique of selecting the vendors having the item for sale

based on a score relating to a plurality of different items offered for sale by the seller that exceeds a predetermined score threshold, and it would be obvious to combine the two references. Furthermore, examiner notes that while Miller does not explicitly teach using the criteria of lowest price to perform the further selection of a featured seller from those identified sellers, the examiner refers to Chopra for teaching the known technique of selecting a seller based on the criteria comprising lowest price, and it would be obvious to combine with Miller and English for the limitation of identifying a features seller based on the lowest price.

In response to applicant's argument that combining Miler with Chopra would "change the functionality of Chopra's method" and would "interfere with the ability of Chopra's method of providing lowest cost purchasing" (Remarks, pages 15-16), the examiner disagrees. First, the examiner notes that she is not certain whether applicant is arguing that the proposed modification renders Chopra unsatisfactory for its intended purchase (see MPEP §2143.01 (V)) or that the proposed modification changes the principle of operation of Chopra (see MPEP §2143.01 (VI)). Nonetheless, the examiner responds that Chopra is used to demonstrate that it was known in the art to use the technique of selecting sellers based on lowest price. This technique can be applied to the selection of sellers by criteria as taught by Miller. It is the combination of the two references that teaches the limitation. Applying the technique taught by Chopra to the step of Miller does not render Chopra unsatisfactory for its intended purpose, in that Chopra would be inoperable, nor does it change the principle operation of Chopra in that no redesign of Chopra is required.

In response to applicant's argument with respect to claim 5 that Miller and English do not teach identifying or selecting a uniform level because Miller performed the process each time the

user requests a product (Remarks, page 19), the examiner disagrees. Miller teaches identifying and selecting in response to receiving a user request as discussed above, with the uniform interval being each time the request is received. Applicant has not defined “uniform time interval” in such a way that precludes the reasonable interpretation of uniform time interval from being each time a user request is received. In response to applicant’s argument that Miller does not teach the most recently featured seller being selected from sellers having availability levels and scores over a threshold (Remarks, page 19), the examiner notes that the arguments are effectively against the references individually, and one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Miller and Chopra teach identifying sellers based on availability and score; Miller further teaches identifying a featured seller from identified sellers based on the additional criteria of hits and payments.

In response to applicant’s argument with response to claim 10 that the display of the controls is not non-functional and that the structure is different (Remarks, pages 20 and 21), the examiner disagrees. The structure of Miller is capable of displaying controls more prominently, i.e. in bold such as for the featured seller, and the display of secondary controls would be performed in the same manner regardless of the display.

In response to applicant’s argument regarding claims 35, 47 and 61 that Callender does not teach an availability threshold because it doesn’t mention a threshold (Remarks, pages 24-25), the examiner disagrees. First, it is the combination of the references that teaches the threshold being settable to different values and corresponding to a time period. English teaches

the technique of setting threshold to differnt values, and Callender teaches the teaching of having the availability threshold settable to different values and corresponding to a time period. Second, applicant has not provided a specific definition of “threshold” and as such, the term is given its broadest reasonable interpretation. Such as interpretation includes the above one.

In response to applicant's wish to draw examiner's attention to other applications (Remarks, page 26), the examiner notes that the listing of references in the remarks is not a proper information disclosure statement. Therefore, unless the references have been cited by the examiner on form PTO-892, they have not been considered.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to AMEE A. SHAH whose telephone number is (571)272-8116. The examiner can normally be reached Monday through Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jeffrey A. Smith can be reached on 571-272-6763. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Amees Shah/  
Examiner, Art Unit 3625

AAS

October 9, 2009